

MT LEGISLATIVE HISTORY

Chapter 426 1989

Bill H (S) 168

Original bill & hist. C

H. Committee on Judiciary

S. Committee on Agriculture, Livestock & Irrig.

Hearing Date(s) Mar 20 ☒ C

Hearing Date(s) Feb 03 ☒ C

 C

Feb 10 ☒ C

 C

 C

 C

 C

Date Out Mar 20 ☒ C

Feb 10 ☒ C

Did this bill originate in an interim committee? Yes No

Committee

Report

HEARING ON SENATE BILL 168

Presentation and Opening Statement by Sponsor: Senator Bengtson stated this is a bill that adds a subsection to section 85-2-234, MCA. Currently, the adjudication laws do not state that the water courts can correct clerical mistakes (e.g., misspelled names) in final decrees. Explicit authority for the court to correct clerical mistakes will eliminate any uncertainty about the legality of making these changes.

List of Testifying Proponents and What Group They Represent:

Jack Ross representing the Water Policy Committee from the firm of Saunders, Snyder, Ross, and Dickson
Carol Mosher representing the Montana Stockgrowers Association, the Montana CattleWomen and the Montana Association of State Grazing Districts
Jo Brunner representing the Montana Water Resource Committee
Ed Steinmetz representing the Montana Water Court
Lorna Frank representing the Montana Farm Bureau
Don MacIntyre representing the Department of Natural Resources and Conservation

List of Testifying Opponents and What Group They Represent:

None

Testimony:
Proponents:

Jack Ross said the bill is essentially a house keeping bill to allow correction of nonsubstantive clerical errors by the water court.

Carol Mosher-See exhibit 8.

Jo Brunner indicated Montana Water Resource supported SB 168, and she urged the committee to pass the bill.

Ed Steinmetz felt SB 168 was a good law. He stated that when a clerical correction is made, there may be a substantive effect. Mr. Steinmetz stated that the water judge has discretion to provide appropriate notice to those individuals possibly affected.

Lorna Frank stated that the Montana Farm Bureau recommended the committee to pass SB 168.

Don MacIntyre stated the department's support for the bill to allow clerical corrections

Questions From Committee Members: None

Closing by Sponsor: Senator Bengtson indicated SB 168 was a clerical correction bill and she urged the committee to do pass.

ADJOURNMENT

Adjournment At: 3:03 p.m.



TOM BECK, Chairman

TB/JJ

ROLL CALL

AGRICULTURE COMMITTEE

DATE 2/3/89

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
SENATOR HUBERT ABRAMS	✓		
SENATOR GARY AKLESTAD	✓		
SENATOR ESTHER BENGTSO	✓		
SENATOR GERRY DEVLIN	✓		
SENATOR JACK GALT	✓		
SENATOR GREG JERGESON	✓		
SENATOR GENE THAYER	✓		
SENATOR BOB WILLIAMS	✓		
SENATOR TOM BECK	✓		

Each day attach to minutes.

SOME BASICS CONCERNING THE WATER RIGHTS ADJUDICATION PROCESS

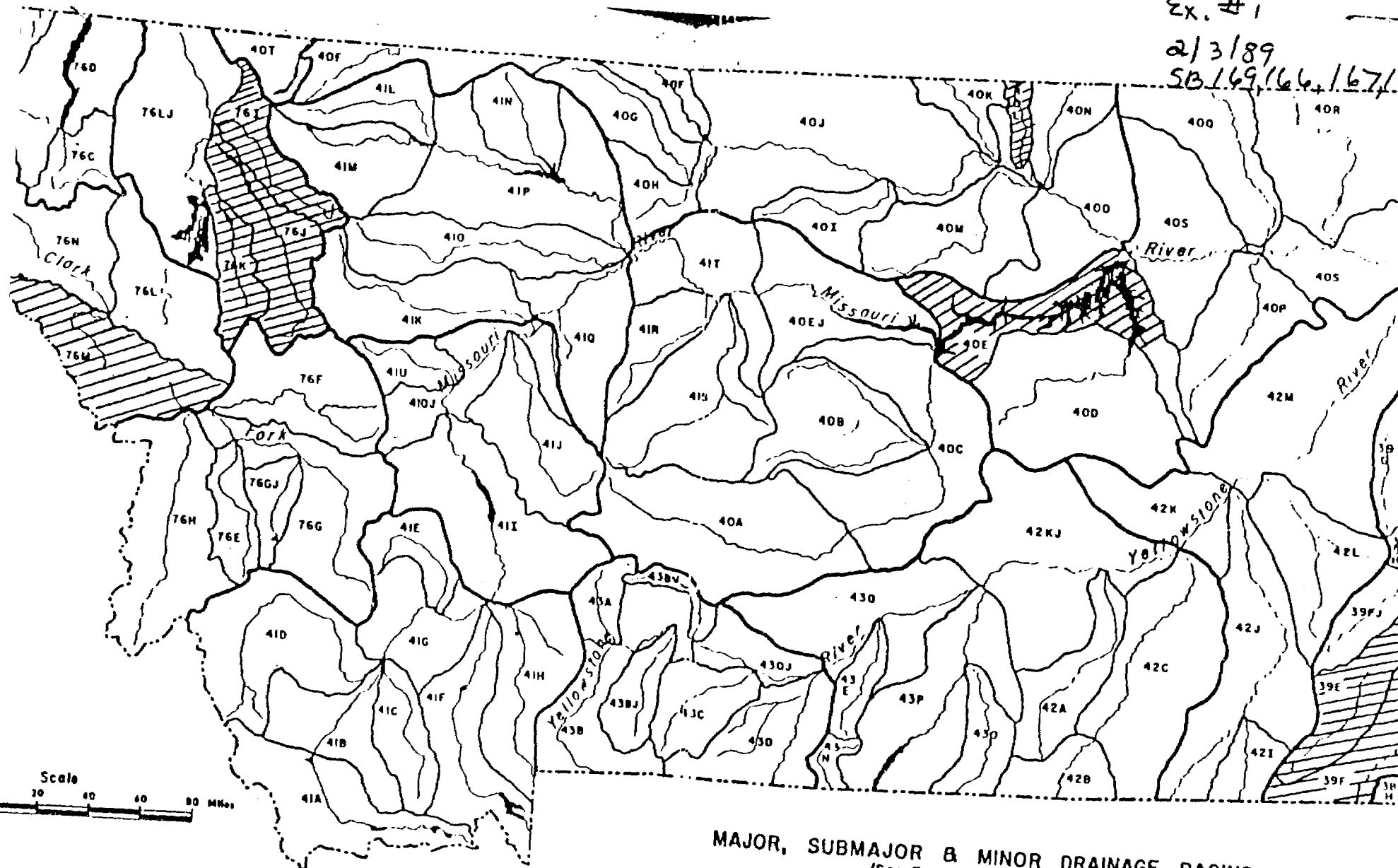
February 1989

1. The Montana Water Courts are organized into four divisions:
 - the Upper Missouri River Basin (Chief Judge W.W. Lessley);
 - the Lower Missouri River Basin (Judge Bernard W. Thomas);
 - the Clark Fork River Basin (Judge Leif Erickson); and
 - the Yellowstone River Basin (Judge Roy C. Rodeghiero).
 2. The current adjudication laws went into effect with the passage of Senate Bill 76 in 1979. The deadline for filing claims of existing (pre-July 1, 1973) rights was April 30, 1982. Over 203,000 claims were filed.
 3. Since 1982, the Water Courts have been reviewing the claims and issuing decrees in various subbasins. There are 85 subbasins in Montana.
 4. The Water Courts issue three types of decrees. A temporary preliminary decree is issued for non-federal and Indian claims in any basin where the federal and Indian claims remain unresolved because of negotiations with the Reserved Water Rights Compact Commission. A preliminary decree is issued when all claims (state-based and federal and Indian claims) are before the court. Senate Bill 169 ensures that both of these decrees are subject to extensive notice and opportunity for objections and hearings.
- Finally, after considering all objections and the evidence before it, the Water Court issues a final decree.
5. The Department of Natural Resources and Conservation is required to assist the Water Courts. The DNRC's functions include maintaining the data base and examining claims for accuracy. Claim examination normally involves in-house review, including air photo interpretation, but can at times involve examination by field office staff at the site of the claim.
 6. With funding from a special appropriation, the Water Policy Committee hired Saunders, Snyder, Ross & Dickson, P.C., of Denver, Colorado to examine the water rights adjudication process to determine if it is legally adequate, particularly if a challenge occurred under the McCarran Amendment (which allows states to adjudicate federal and Indian claims).

Ex. #1

2/3/89

SB 169, 166, 167, 168



MAJOR, SUBMAJOR & MINOR DRAINAGE BASINS
(See Reverse Side for Index)

DATE 2/3/89

The Water Rights Adjudication Bill BILL NO. SB 167 SB 168
By Request of the Water Policy Committee
Senator Esther Bengtson, sponsor

The Water Policy Committee's principal agenda item for the 1987-1989 interim was Montana's water rights adjudication process. This focus resulted from an appropriation by the 1987 Legislature to hire a consultant with no conflict of interest to review and analyze the adjudication process.

The consultant -- Saunders, Snyder, Ross & Dickson, P.C. of Denver, Colorado -- evaluated the adjudication process for over a year and delivered a comprehensive set of recommendations. Many of the recommendations stressed very positive aspects of the current adjudication, assuring the committee that the the process is not "so grievously flawed as to require a massive legislative overhaul." The consultant did, however, recommend some minor legislative fine-tuning to ensure the results sought by the legislature in 1979 are achieved.

The committee seriously considered the consultant's recommendations and proposed legislation. The result of its deliberations is contained in the committee report and a legislative package of four bills.

I. Senate Bill 169

Senate Bill 169 provides explicitly that the Water Courts may issue temporary preliminary decrees (a practice already occurring) and makes certain modifications to the notice requirements and to the objections and hearings process.

Section 1

Subsection 5 states that a temporary preliminary decree may be issued in a basin where adjudication of federal and Indian claims is precluded by the suspension under 85-2-217. The suspension is provided so that the Reserved Water Rights Compact Commission may attempt to negotiate a settlement of these rights with the various federal and Indian entities.

Subsection 6 describes the relationship between the temporary preliminary decree and preliminary decree. The temporary preliminary decree must be used in issuing the preliminary decree, but upon issuance the preliminary decree supercedes the temporary preliminary decree.

Section 2

This section describes new notice requirements for temporary preliminary decrees and preliminary decrees. Notice by mail must be sent to each person or entity with a claim, permit or

reservation in the subbasin at issue. In addition, notice of the decree's availability must be published in at least 3 newspapers geographically distributed in the general basin in which the subbasin is located.

Section 3

The hearings process is identical for temporary preliminary and preliminary decrees. As stated in subsection (1) of the bill, the DNRC and persons within the entire basin, including the subbasin, may object to claims in the decree at issue. However:

no objection seeking to reopen and review any matter previously litigated and resolved as a result of any previous objection process is allowed." (p. 2, lines 4-6)

The exception provided for the federal government and the Indian tribes is necessary because of the ongoing negotiations with these entities by the Reserved Water Rights Compact Commission.

Subsection 2 extends the time period for filing objections and requests for hearing to 180 days after notice is given of the decrees. Two 90-day extensions, for good cause shown, are also provided. This helps to ensure that adequate time is available for interested parties to review the decree.

The amendments in the remainder of the section simply apply existing law to temporary preliminary decrees.

The effective date for this bill and Senate Bills 166, 167, and 168 is when the last bill is passed and approved (or killed).

II. Senate Bill 166

This bill enables the district courts to administer or enforce water rights according to a temporary preliminary decree, as modified after hearings and objections, or a preliminary decree. Under existing law, only final decrees may be administered.

The bill also removes water rights administration from the water courts, thereby emphasizing the courts' principal adjudication function.

Sections 1, 4 and 8

Sections 1 and 8 strike references to section 3-7-213, MCA, which provides for designation of alternate judges by the water judge from the population of district court and retired district court judges. This change still allows a water judge from another division to sit as a water judge if requested by the chief justice of the Supreme Court or the water judge pursuant to subsection (2) of this section.

Section 2

Section 3-7-211 is amended so that exclusive authority for administration of decrees lies with the district courts and not the water courts. The amendment emphasizes the role of the water courts in adjudicating existing water rights, not administering water rights. Water commissioners appointed by the district court have authority to distribute water according to the terms of the decree.

Section 3

"This section is fundamental to this bill. Note that the district court has jurisdiction and that the court can administer not only a final decree but also temporary preliminary and preliminary decrees.

Section 5

Under existing law (85-2-227), a properly filed claim of existing right constitutes prima facie proof of its content until a final decree is issued. This amendment modifies the prima facie status of a claim for administration purposes only by stating that the claim is superceded by the issuance of a temporary preliminary decree as modified after hearings and objections or by a preliminary decree. The change ensures that rights will be administered according to the most accurate determination available.

Section 6

This section describes a process for resolving water distribution controversies. Again, the district courts supervise this process. However, if the matter involves an existing (pre-July 1, 1973) water right that has not been adjudicated in a final decree, the part of the controversy involving the determination of the pre-1973 right is referred to the water courts. The water court resolves the matter and then refers it back to the district court for inclusion with other matters concerning the controversy. The district court then administers the decree.

Section 7

Note the amendment to subsection (2), which provides for appointment of water commissioners upon application by the DNRC in areas or basins that have a temporary preliminary decree, preliminary decree or final decree. Subsection (1), which provides for water commissioners upon petition of water right holders, is not amended because it references any "decree".

1
III. Senate Bill 168

With certain limitations, this bill reopens all temporary preliminary decrees, preliminary decrees, and final decrees that have been issued by the Water Courts for reexamination and objections. Section 1 of the bill would be a new section in Title 85, chapter 2, part 2 (the adjudication laws).

Subsection 1

This subsection calls for reopening of all decrees within 180 days after this bill is enacted.

Subsection 2

The notice and hearings process is identical to the process provided for temporary preliminary and preliminary decrees. The DNRC, and persons within the entire basin (including the subbasin) may object to claims in the decree at issue. However:

no objection seeking to reopen and review any matter previously litigated and resolved as a result of any previous objection process is allowed." (p. 2, lines 4-6)

The exception provided for the federal government and the Indian tribes is necessary because of the ongoing negotiations with these entities by the Reserved Water Rights Compact Commission.

Subsections 3 and 4

Notice requirements for the reopening of a decree is identical to notice provided for new temporary preliminary and preliminary decrees (see section 2, Senate Bill 169).

Subsection 5

A 180-day time period, with possibly two 90-day extensions, is provided for objections. Again, this matches the time period for new temporary preliminary and preliminary decrees (see section 2, Senate Bill 169).

Subsections 6 and 7

Subsection 6 ensures notice to claimants of objections to their claims. Subsection 7 allows the water judge to dismiss the objection or to modify claims based on the evidence before him.

Subsections 8

Appeals are allowed from the final decree. An appeal from a temporary preliminary or preliminary decree may occur when the applicable decree becomes a final decree.

EX. 2
2/3/89

IV. Senate Bill 168

This bill adds a subsection to section 85-2-234, MCA. Currently, the adjudication laws do not state that the water courts can correct clerical mistakes (e.g., misspelled names) in final decrees. Explicit authority for the court to correct clerical mistakes will eliminate any uncertainty about the legality of making these changes.

SENATE AGRICULTURE
EXHIBIT NO. 8
DATE 3/7/89
BILL NO. SB 168
WM. T. HARRIS
EARL LINDGREN
ROLAND MOSHER
GREG RICE

OFFICERS:

WM. J. BROWN, JR. SAND SPRINGS PRESIDENT
JAMES COURTNEY ALZADA FIRST VICE PRESIDENT
EDWARD J. LORD PHILIPSBURG SECOND VICE PRESIDENT
JEROME W. JACK HELENA EXECUTIVE VICE PRESIDENT
KIM ENKERUD HELENA NATURAL RESOURCES COORDINATOR



EXECUTIVE COMMITTEE:

CLARENCE BLUNT REGINA
BILL CHRISTENSEN HOT SPRINGS
LYNN CORNWELL GLASGOW
M.E. EDDLEMAN WORDEN
NANCY ESPY BOYES

February 3, 1989

Mr. Chairman and Members of the Senate Agriculture Committee

My name is Carol Mosher and today I am representing the Montana Stockgrowers Association, the Montana CattleWomen and the Montana Association of State Grazing Districts.

We are in support of Senate Bill 168 to correct clerical errors. For example, if this law would have been in effect it would have saved our own ranch time and money. We sent over 100 water applications in under the name of Tee Bar Ranch Corporation. They came back T Bar Ranch and we had to correct each one and send back.

Thank you for this opportunity to testify in support of this bill.

Carol Mosher

SB 168 Correction of Clerical Mistakes in Final Decrees

COMMENTS

① Good law. When "clerical correction" may have substantive effect, wt Judge has discretion to provide appropriate Notice to those possibly affected

2/3/89 10f3

Agriculture

VISITORS' REGISTER

[illegible]

Apiculture

VISITORS' REGISTER

[illegible]

(Please leave prepared statement with Secretary)

2/3/89

~~3093~~

DATE 12-1-54

VISITORS' REGISTER

[illegible]

Closing by Sponsor: Representative Hayne, See exhibit 4.

DISPOSITION OF HOUSE BILL 170

Discussion: None

Amendments and Votes: None

Recommendation and Vote: Senator Thayer moved HB 170 BE CONCURRED IN. The motion carried unanimously. Senator Aklestad moved that HB 170 be placed on the consent calendar; the motion was seconded by Senator Devlin. The motion carried unanimously.

Senator Thayer agreed to carry HB 170 on the floor.

DISPOSITION OF SENATE BILL 168

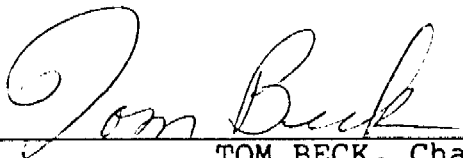
Discussion: Doug Sternberg discussed the amendments to SB 166, SB 167, SB 168, and SB 169. See exhibits 5, 6, 7, and 8.

Amendments and Votes: Senator Bengtson moved the amendments to SB 168; the motion was seconded by Senator Galt.

Recommendation and Vote: Senator Bengtson moved SB 168 DO PASS AS AMENDED. The motion carried unanimously.

ADJOURNMENT

Adjournment At: 2:32 p.m.



TOM BECK, Chairman

TB/jj

ROLL CALL

AGRICULTURE COMMITTEE

DATE 2/10/89

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
SENATOR HUBERT ABRAMS	✓		
SENATOR GARY AKLESTAD	✓		
SENATOR ESTHER BENGTSON	✓		
SENATOR GERRY DEVLIN	✓		
SENATOR JACK GALT	✓		
SENATOR GREG JERGESON	✓		
SENATOR GENE THAYER	✓		
SENATOR BOB WILLIAMS	✓		
SENATOR TOM BECK	✓		

Each day attach to minutes.

SENATE STANDING COMMITTEE REPORT

February 11, 1989

MR. PRESIDENT:

We, your committee on Agriculture, Livestock, and Irrigation, having had under consideration SB 168 (first reading copy -- white), respectfully report that SB 168 be amended and as so amended do pass:

1. Title, line 6.

Following: "JUDGE;"

Insert: "REQUIRING THAT THE FINAL DECREE ESTABLISH A TABULATION OF WATER RIGHTS AND THEIR RELATIVE PRIORITIES;"

2. Title, line 7.

Strike: "AN EFFECTIVE DATE AND"

3. Page 2, line 10.

Following: "(4)"

Insert: "The final decree shall establish in a form determined to be appropriate by the water judge one or more tabulations or lists of all water rights and their relative priorities."

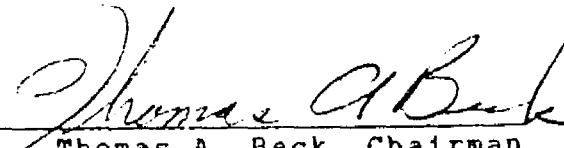
Renumber: subsequent subsections

4. Page 5, lines 2 through 10.

Strike: Section 4 in its entirety

AND AS AMENDED DO PASS

Signed:


Thomas A. Beck, Chairman

41.0.1
21.11.5
10.1

Amendments to Senate Bill No. 168
Introduced Reading Copy

DATE 2/10/89
BILL NO. SB168

For the Committee on Senate Agriculture

Prepared by Doug Sternberg, Committee Staff
February 10, 1989

1. Title, line 6.

Following: "JUDGE;"

Insert: "REQUIRING THAT THE FINAL DECREE ESTABLISH A TABULATION
OF WATER RIGHTS AND THEIR RELATIVE PRIORITIES;"

2. Page 2, line 10.

Following: "(4)"

Insert: "The final decree shall establish in a form determined to
be appropriate by the water judge one or more tabulations or
lists of all water rights and their relative priorities."

Renumber: subsequent subsections

2/10/89

VISITORS' REGISTER

[illegible]

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dave Brown, on March 20, 1989, at 8:10 a.m.

ROLL CALL

Members Present: All members were present with the following exception:

Members Excused: Rep. Kelly Addy

Members Absent: None.

Staff Present: Julie Emge, Secretary
John MacMaster, Legislative Council

Announcements/Discussion: None.

HEARING ON SENATE BILLS 166, 167, 168, 169

Presentation and Opening Statement by Sponsor:

Sen. Esther Bengtson, Senate District 49 presented an exhibit that explained how the adjudication process began and that these bills are being introduced to clarify the adjudication process in Montana (EXHIBIT 1).

Sen. Bengtson presented exhibits for SB's 166, 167, 168, and 169 (See EXHIBITS 2, 3, 4, and 5).

Testifying Proponents and Who They Represent:

Jack Ross, Water Quality Committee
Jo Bruner, Executive Secretary, Montana Water Resources Assoc.
Ted Downey, Attorney Specializing in Water Law

Proponent Testimony:

Jack Ross stated that Montana has a very fine adjudication system. He said that he found that the statute did not have, as many of the states in the west do, a specific provision for the correction of clerical errors and decree. When they look at the need to adjudicate over 200,000 water rights in a time frame that is greatly collapsed by any other standards in the west, they have to recognize the possibility of such errors occurring and it is appropriate to provide mechanism for fixing those. The water courts had followed a practice where it was necessary for

administrative purposes to issue temporary preliminary decrees, before they were in position to enter what were provided in the statute for preliminary decrees. Another problem was that under existing law only final decrees can be administered. He proposed two amendments for SB 166 and SB 169 (EXHIBITS 6 and 7).

Jo Bruner stated that the Montana Water Resources Association supports these bills as they came out of the Senate.

Ted Downey stated he supports the amendments that have been generated by the Water Policy Committee. Many concerns that they had on the bills is SB 169 appears that the water court finds good cause to hold a hearing on every objection to a water right claim. Under the current law the statute says that the department can object to a water right claim or any person who is named in a decree can object to a claim and get a hearing without the water court finding good cause for that objection. Good cause is required to have a hearing by any other person who files objections that was not named in the decree.

Testifying Opponents and Who They Represent:

Richard Aldrich, Field Consultant, Department of Interior

Opponent Testimony:

Richard Aldrich stated that the function of SB 169 is that it gives the authority to the water courts for the issuance of preliminary decrees and it also defines how they may be used and administered. It provides for notice in the basin and provides for specific notice, prospectively by publication to water right holders outside a basin within a water shed. This provides for them an opportunity to appear and object to matters that may be determined in those decrees. Mr. Aldrich presented proposed amendments to SB 169 (EXHIBIT 8).

Questions From Committee Members: Rep. Brown asked Mr. Ross what he thought about the amendments. Mr. Ross stated that the question that Mr. Downey proposed dealt with a necessity for a good cause to be shown in order to object. He said he agreed that it is correct with respect to the original statute that the rights of the department people be named and the temporary preliminary decree to object did not require a showing of good cause. The distinction was made for other persons who may want to appear would have to show they had good cause for such an objection.

Rep. Brown asked Ed Steinmetz, Water Master for the Water Court, with the failure of his testimony for these bills does this mean he is neutral. Mr. Steinmetz stated that he didn't take a position because the Water Court is basically neutral and its position as a court. They have worked in

there are still some concerns that do exist.

Rep. Brown questioned Mr. Aldrich if he was representing each of the five agencies as well with these statements or is this the general department divisions. Mr. Aldrich stated it is the departments position and the agencies as well.

Rep. Brown asked Mr. Aldrich if he had seen Mr. Ross' amendment that proposes to strike subsection C on SB 169. Mr. Aldrich stated that he has seen the amendments and said that his concern is more fundamental than simply with subsection C. It goes to the very process and the effect of the two track adjudication.

Rep. Brown commented to Mr. Aldrich that ten years ago when they set up the water adjudication process in Montana, they created a two track system at the federal governments request. Is he saying that he doesn't like the system the way it was done? Mr. Aldrich responded that what they are objecting to is the temporary decree process which they are proposing to codify, which was something invented by the court so that he court could move forward in areas where the adjudication they thought was going to be suspended. It was their impression that the adjudication would be completely suspended with respect to all parties in basins where they were negotiating entities particularly to the Indian tribes. The Water Court then invented the TPD process to allow the Water Court to issue decrees involving only the state appropriative claims in basins where there are reserved rights which are being negotiated.

Rep. Hannah asked Mr. Aldrich what would happen if they didn't pass the law. Would it improve their position with the department on the current practices of the court? Mr. Aldrich replied that they believe that if they don't pass the law it should send a message to the court that this is perhaps an authorized procedure. The court has been relying on the statute that allows them to enter other temporary decrees for the purposes of administration or for other purposes.

Rep. Brooke asked Mr. Ross if he could give an example of the procedures that he is referring to on page 4, lines 1-10. Mr. Ross stated that until a decree is issued for a claim, the claim constitutes prima facie evidence of the elements of a water right the person has claimed. In those basins where the adjudication has not reached the level of a temporary preliminary decree or preliminary decree, and under this provision would allow administration, then the District Court to consider the claim stated as prima facie evidence of the right in its determination of how administration would go forward. As soon as the Water Court has entered a temporary decree or a preliminary decree the material determined in the claim is no longer prima facie evidence for administrative purposes. Then they would move

to the decretal provision to determine how the administration will proceed.

Rep. Brown questioned Mr. Steinmetz if he would address Mr. Downey's concern on the good cause showing on page 6 in SB 169 and how does the court presently interpret that. Mr. Steinmetz stated that he wasn't aware of Mr. Downey's proposed amendment, but it is his impression that the way the court has read the statute and has interpreted it to this point, good cause is required for each of those entities for the department, anyone named in the decree, or for any other person. They construe good cause for the department to be very broad, they don't just require them to have a personal interest in the matter. The danger in taking out good cause requirement for people named in the decree is if there isn't good cause it gives them a reason to dismiss a harassing or spite objection.

Rep. Brown asked Mr. Downey if he would agree that the decision in this area is pretty much a policy decision on how it should apply. It is a question of whether the committee thinks it should apply across the board or be limited in the fashion that he would like. Mr. Downey commented that if the Water Court had been interpreting it the way they have, it appears it is working out satisfactorily, but the people aren't aware of that interpretation.

Closing by Sponsor: Sen. Bengtson stated that they must proceed. They feel that they have addressed the concerns of the federal government. The amendments, which address the federal government, were drafted by people from the Dept. of Natural Resources and from the Compact Commission that deals with the water rights. She commented that she doesn't feel they need anymore amendments.

DISPOSITION OF SENATE BILL 166

Motion: Rep. Stickney moved SB 166 BE CONCURRED IN, motion seconded by Rep. Nelson.

Discussion: None.

Amendments, Discussion, and Votes: Rep. Eudaily moved SB 166 be amended as follows:

Page 7, line 15

Following: "DECREE"

Insert: ", or a person exercising a suspension under 85-2-217 and part of 7 of this chapter,"

Page 7, lines 16 through 18

Strike: "IF HE" on line 16 through "DECREE" on line 18

The amendments were seconded by Rep. Nelson and CARRIED unanimously.

Recommendation and Vote: Rep. Darko moved SB 166 BE CONCURRED IN AS AMENDED, motion seconded by Rep. Nelson. Motion CARRIED with Rep. Boharski voting against the motion.

DISPOSITION OF SENATE BILL 167

Motion: Rep. Wyatt moved SB 167 BE CONCURRED IN, motion seconded by Rep. Darko.

Discussion: None.

Amendments, Discussion, and Votes: Rep. Mercer moved the bill be amended as follows:

Page 2, lines 15 through 18

Strike: "A PERSON" on line 15 through the end of line 18

The amendment was seconded by Rep. Eudaily and CARRIED with Rep.'s Daily, Darko, Wyatt, Strizich, Brown, and McDonough voting Nay.

Recommendation and Vote: Rep. Knapp moved SB 167 BE CONCURRED IN AS AMENDED, motion seconded by Rep. Stickney. Motion CARRIED with Rep. Daily voting against the motion.

DISPOSITION OF SENATE BILL 168

Motion: Rep. Nelson moved SB 168 BE CONCURRED IN. Rep. Wyatt seconded the motion.

Discussion: None.

Amendments, Discussion, and Votes: None.

Recommendation and Vote: Question was called for on the motion and CARRIED unanimously.

DISPOSITION OF SENATE BILL 169

Motion: Rep. Wyatt moved SB 169 BE CONCURRED IN. Rep. Nelson seconded the motion.

Discussion: None.

Amendments, Discussion, and Votes: Rep. Wyatt moved SB 169 be amended as follows:

Page 7, lines 7-16

Strike: subsection (c) in its entirety

DAILY ROLL CALL

JUDICIARY

COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date March 20, 1989

NAME	PRESENT	ABSENT	EXCUSED
REP. KELLY ADDY, VICE-CHAIRMAN			X
REP. OLE AAFEDT	X		
REP. WILLIAM BOHARSKI	X		
REP. VIVIAN BROOKE	X		
REP. FRITZ DAILY	X		
REP. PAULA DARKO	X		
REP. RALPH EUDAILY	X		
REP. BUDD GOULD	X		
REP. TOM HANNAH	X		
REP. ROGER KNAPP	X		
REP. MARY McDONOUGH	X		
REP. JOHN MERCER	X		
REP. LINDA NELSON	X		
REP. JIM RICE	X		
REP. JESSICA STICKNEY	X		
REP. BILL STRIZICH	X		
REP. DIANA WYATT	X		
REP. DAVE BROWN, CHAIRMAN	X		

STANDING COMMITTEE REPORT

March 20, 1989

Page 1 of 1

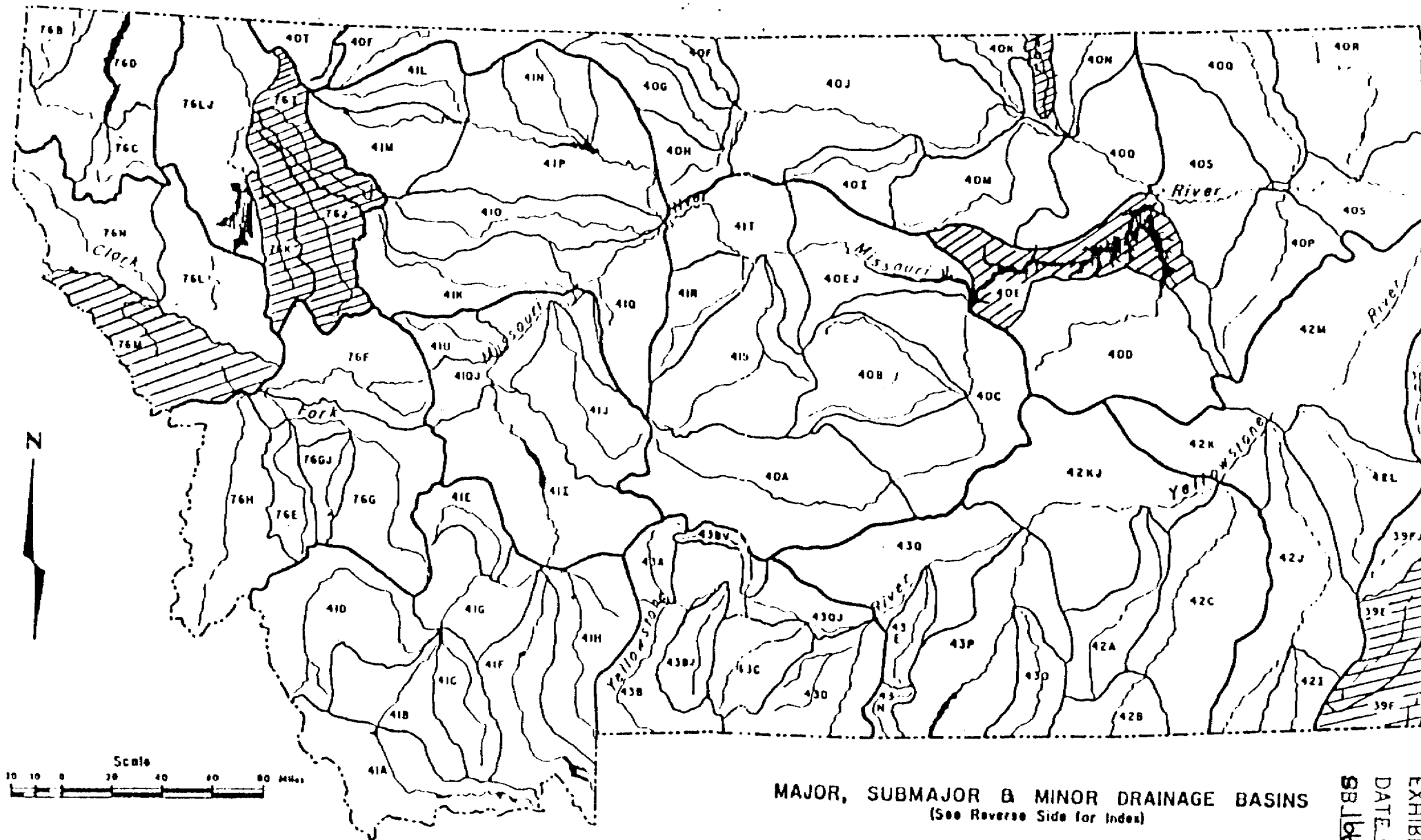
Mr. Speaker: We, the committee on Judiciary report that
SENATE BILL 168 (third reading copy -- blue) be concurred in .

Signed: 
Dave Brown, Chairman

SOME BASICS CONCERNING THE WATER RIGHTS ADJUDICATION PROCESS

March 1989

1. The Montana Water Courts are organized into four divisions:
 - the Upper Missouri River Basin (Chief Judge W.W. Lessley);
 - the Lower Missouri River Basin (Judge Bernard W. Thomas);
 - the Clark Fork River Basin (Judge Leif Erickson); and
 - the Yellowstone River Basin (Judge Roy C. Rodeghiero).
 2. The current adjudication laws went into effect with the passage of Senate Bill 76 in 1979. The deadline for filing claims of existing (pre-July 1, 1973) rights was April 30, 1982. Over 203,000 claims were filed.
 3. Since 1982, the Water Courts have been reviewing the claims and issuing decrees in various subbasins. There are 85 subbasins in Montana.
 4. The Water Courts issue three types of decrees. A temporary preliminary decree is issued for non-federal and Indian claims in any basin where the federal and Indian claims remain unresolved because of negotiations with the Reserved Water Rights Compact Commission. A preliminary decree is issued when all claims (state-based and federal and Indian claims) are before the court. Senate Bill 169 ensures that both of these decrees are subject to extensive notice and opportunity for objections and hearings.
- Finally, after considering all objections and the evidence before it, the Water Court issues a final decree.
5. The Department of Natural Resources and Conservation is required to assist the Water Courts. The DNRC's functions include maintaining the data base and examining claims for accuracy. Claim examination normally involves in-house review, including air photo interpretation, but can at times involve examination by field office staff at the site of the claim.
 6. With funding from a special appropriation, the Water Policy Committee hired Saunders, Snyder, Ross & Dickson, P.C., of Denver, Colorado to examine the water rights adjudication process to determine if it is legally adequate, particularly if a challenge occurred under the McCarran Amendment (which allows states to adjudicate federal and Indian claims).



MAJOR, SUBMAJOR & MINOR DRAINAGE BASINS
(See Reverse Side for Index)

EXHIBIT
DATE 3-20-89
SB 166, 167, 168 +

The Water Rights Adjudication Bills
By Request of the Water Policy Committee
Senator Esther Bengtson, sponsor
March 20, 1989

The Water Policy Committee's principal agenda item for the 1987-1989 interim was Montana's water rights adjudication process. This focus resulted from an appropriation by the 1987 Legislature to hire a consultant with no conflict of interest to review and analyze the adjudication process. The consultant's report, and the committee's final conclusions, stress that the adjudication process is working properly but that some minor legislative changes are needed to ensure that the results sought by the legislature in 1979 are achieved.

Several technical amendments are added to these bills by the Senate Agriculture Committee as a result of discussions and consensus recommendations offered by technical persons attached to the Water Policy Committee, the Water Courts, the DNRC, and the Reserved Water Rights Compact Commission.

I. Senate Bill 166

This bill enables the district courts to administer or enforce water rights according to a temporary preliminary decree or a preliminary decree, as modified after objections and hearings. Under existing law, only final decrees may be administered.

The bill also places water rights administration solely with the district courts, thereby emphasizing the water courts' principal adjudication function. The major sections of the bill are sections 2, 3, 5, 6 and 7.

Section 2

Section 3-7-211 is amended so that exclusive authority for administration of decrees lies with the district courts and not the water courts. The amendment emphasizes the role of the water courts in adjudicating existing water rights, not administering them. Water commissioners appointed by the district court have authority to distribute water according to the terms of the decree, as modified after objections and hearings.

Section 3

This section is fundamental to the bill. Note that the district court has jurisdiction and that the district court can administer not only a final decree but also temporary preliminary and preliminary decrees.

Senate Bill 166 -- Page 2

Section 5

Under existing law (85-2-227), a properly filed claim of existing right constitutes prima facie proof of its contents until a final decree is issued. This amendment modifies the prima facie status of a claim or amended claim for administration purposes only by stating that the claim is superseded by the issuance of a temporary preliminary decree or preliminary decree, as modified after objections and hearings. The change ensures that rights will be administered according to the most accurate determination available.

Section 6

This section amends 85-2-406 to describe how the district court shall resolve water distribution controversies and enforce decrees. The Senate Agriculture Committee amendments restate much of the original statute and provide for enforcement of temporary preliminary and preliminary decrees in subsection (2).

Again, the district courts supervise this process. If the matter involves an existing (pre-July 1, 1973) water right that has not been adjudicated in a final decree, the part of the controversy involving the determination of the pre-July 1, 1973 right would be referred to the water courts.

Subsection (5) provides an appeals process to persons who might be harmed by the administration of a temporary preliminary or preliminary decree. Otherwise, the person would have to wait until the final decree is issued. [Note amendments]

Section 7

The amendments allow for the appointment of a water commissioner to administer or enforce a temporary preliminary, preliminary or final decree.

Section 11

The applicability section allows a person whose rights are already determined in an existing temporary preliminary decree or preliminary decree to petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree (a mini-reopening provision).

Section 12

The effective date for this bill and Senate Bills 167 and 169 is when the last bill receives final action.

II. Senate Bill 167

Section 1 of the bill would be a new section in Title 85, chapter 2, part 2 (the adjudication laws).

Subsection 1

Subsection 1 states the general purpose of the bill. At some time the Water Courts must reopen every preliminary or final decree that has not been noticed throughout the water divisions. This ensures that persons throughout the general stream basin will have a chance to participate in the adjudication process and bolsters the probability that Montana's adjudication process will withstand any federal challenge.

Subsection 2

The limitation on who can object when a decree is reopened, as agreed to by the technical representatives mentioned earlier and adopted by the Senate Agriculture committee, is stated in subsection 2(b) of section 1:

A person may not raise an objection to a matter in a reopened decree if he was a party to the matter when the matter was previously litigated and resolved as the result of a previous objection process.

Thus, a person is precluded from objecting to a matter in a reopened decree if he actively litigated the matter as an issue during previous objections and hearings.

Subsections 3 and 4

This section describes notice requirements for reopened decrees. Notice by mail must be sent to each person or entity with a claim, permit or reservation in the basin at issue. In addition, notice of the decree's availability must be published in at least 3 newspapers geographically distributed in the general stream basin in which the basin is located.

Subsection 5

A longer 180-day time period, with possibly two 90-day extensions, is provided for objections. This helps ensure ample opportunity for participation by affected persons.

Subsections 6, 7 and 8

Subsection 6 ensures notice to claimants of objections to their claims. Subsection 7 allows the water judge to dismiss the objection or to modify claims based on the evidence before him. Subsection 8 reinforces that appeals are allowed from a final decree. In addition, an appeal is available under SB 166 if the decree is being enforced.

III. Senate Bill 168

This bill adds a subsection to section 85-2-234, MCA. Currently, the adjudication laws do not state that the water courts can correct clerical mistakes (e.g., misspelled names) in final decrees. Explicit authority for the court to correct clerical mistakes will eliminate any uncertainty about the legality of making these changes.

The amendment added as subsection 4 ensures that the final decree will have a list of the existing rights and their relative priority in a form determined appropriate by the water judge.

IV. Senate Bill 169

Senate Bill 169 provides explicitly that the Water Courts may issue temporary preliminary decrees (a practice already occurring) and modifies the notice requirements and the objections and hearings process.

Section 1

New subsection 1 is a new version of the old subsection 5 (now stricken). The subsection states that a temporary preliminary decree may be issued by water courts as needed to allow orderly administration or adjudication of water rights.

Subsection 6 describes the relationship between the temporary preliminary decree and preliminary decree. The temporary preliminary decree must be used in issuing the preliminary decree, though the preliminary decree, after objections and hearings, supercedes the temporary preliminary decree.

Section 2

Notice of a preliminary decree must be published throughout the general stream basin prior to the issuance of a final decree.

Section 3

The objections hearings process is largely identical to the process provided for the reopening of decrees (SB 167). The limitation on who may object at the preliminary decree stage is also conceptually the same as the limit used in SB 167:

...a person may not raise an objection to a matter in a reopened decree if he was a party to the matter when the matter was previously litigated and resolved as the result of an objection raised in a temporary preliminary decree.

Subsection 2 extends the time period for filing objections and requests for hearing to 180 days after notice is given of the

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decrees. Two 90-day extensions, for good cause shown, are also provided. This helps to ensure that adequate time is available for interested parties to review the decree.

The amendments in the remainder of the section simply apply existing law to temporary preliminary decrees.

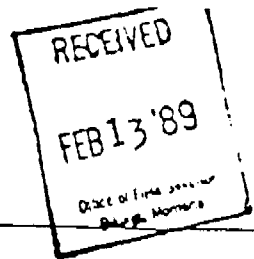
Section 4

Section 4 is a new amended section providing that appeals from a final decree may be based on objections raised to or rights affected by a temporary preliminary decree.

Section 5 is a coordination instruction that would remove enforcement language if SB166 dies. [However, note the proposed amendment to strike section 3(1)(c)....page 7, lines 12-16].



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90-6-2-1



Washington, D.C. 20530

February 9, 1989

Senator Jack E. Galt
Chairman
Reserved Water Rights Compact Commission
1520 East Sixth Avenue
Helena, Montana 59620-2301

Dear Senator Galt:

Re: Montana Water Adjudication - Comments on
Proposed Legislation Respecting Temporary
Preliminary Decrees.

This is in reference to your letter dated December 28, 1988, to the Interior Department Field Solicitor in Billings, inviting comments on proposed legislation regarding the statewide water adjudication process. We offer the comments below on behalf of the Department of Justice, which has the primary responsibility of representing the United States and its agencies in the water proceedings.

The draft bills which have been brought to our attention deal with reopening decrees of water rights, the use of temporary preliminary decrees, the administration of the latter form of decree, and correction of clerical errors in decrees. The following is not an exhaustive recitation of all of our views on these subjects. Rather, we note here matters of special concern, particularly on the subject of temporary preliminary decrees.

I. Formalized Use of Temporary Preliminary Decrees (TPD's). -- The comments under this heading relate to the draft entitled "An Act Providing Clear Authority for the Issuance of Temporary Decrees in Those Basins in Which Adjudication of Claims for Federal or Indian Water Rights Is Precluded," etc. That bill does what its title states: it expressly authorizes the issuance of TPD's in any basin in which adjudication of claims for federal or Indian reserved water rights is prevented by M.C.A. § 85-2-217, which suspends the adjudication of such water rights while they are being negotiated with the Compact Commission. The bill also states that the TPD shall address all claims in the basin except those affected by the suspension. (See proposed § 85-2-231(d)(5).)

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A. TPD's Lead to a Piecemeal Adjudication. -- The Montana Water Court has been routinely entering TPD's for years. The draft bill would formally sanction that practice. We oppose this provision because, as explained below, the routine use of temporary preliminary decrees in the Montana adjudication is leading to a piecemeal adjudication of water rights, contrary to the McCarran Amendment, 43 U.S.C. § 666.

The McCarran ~~enactment~~ is a waiver of sovereign immunity which authorizes the joinder of the United States in a general stream adjudication. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). As a statute consenting to suit against the United States, any conditions which Congress has attached to that consent must be strictly observed, and exceptions thereto must not be lightly implied. Block v. North Dakota, 461 U.S. 273, 287 (1983).

The McCarran statute consents to suit against the United States on the condition that the proceedings be comprehensive, in which all water claimants are joined and all rights to the use of water are decreed. Dugan v. Rank, 372 U.S. 609, 617-619 (1963) (McCarran Amendment did not authorize suit where all claimants to water rights in San Joaquin River were not joined as parties and priorities were not to be determined among all parties). The McCarran statute was designed to avoid the adjudication of water rights in a "piecemeal" fashion. Colorado River, 424 U.S. at 819.

The utilization of TPD's to adjudicate rights based upon state law, while federal reserved rights are subject to the negotiation process of M.C.A. §§ 85-2-701 through -705, indicates that in practice Montana's water adjudication is devolving into a piecemeal adjudication, against the intent of the McCarran Amendment.

In actuality, since the initiation of the Senate Bill 76 proceedings, little progress has been made in achieving settlements of Indian and federal reserved rights.^{1/} Nonetheless, the adjudication of those rights has been stayed during the pendency of formal "negotiations" between the Compact Commission and federal agencies and Indian Tribes, by virtue of § 85-2-217. In the meantime, the Water Court has been proceeding with haste to determine all state law water rights, chiefly through the device of TPD's. In effect, state law water rights and federal reserved rights are being processed under different statutory regimes, and it is an open question whether the Water Court will be able, at some time in the distant future,

^{1/} The Northern Cheyenne Tribe has recently made a settlement proposal to the Compact Commission. We hope that the Commission is prepared to begin negotiations soon on this matter.

to integrate the determination of these two classes of rights into unitary final decrees. Thus, the piecemealing of the Senate Bill 76 process could have unfortunate consequences several years down the road.

The foregoing does not mean that temporary decrees should never be entered in advance of the preliminary decree authorized by M.C.A. § 85-2-231. There may well be occasions when there is a genuine need for interlocutory or temporary relief in a basin pending the general adjudication of all water interests in that basin. This, however, is very different from the two-track system which has been employed in the adjudication to date, and which will be formalized if the bill becomes law. We have already suggested to the Montana Supreme Court that the following language be added to the Water Claims Examination Rules in order to allow for interlocutory decrees in appropriate situations:

Pursuant to M.C.A. § 85-2-231(1)(d), the Water Court may issue an interlocutory decree or other temporary decree pursuant to § 85-2-321 or if such decree is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree. Prior to issuing such an interlocutory or other temporary decree, the Water Court shall make a determination, supported by findings of fact and conclusions of law, that such a decree is authorized by § 85-2-321 or is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree. This determination will be upheld if supported by substantial evidence.

See United States' Comments on Water Claims Examination Rules at 11, In re DNRC, No. 86-397 (Mont. Sup. Ct.). The suggested language addresses the need for an interim decree before the preliminary decree, while avoiding the routinized use of TPD's.

In addition, the proposed bill would apparently permit TPD's to be issued for basins within federal reservations, including Indian Reservations. It has been the Water Court practice to refrain from entering TPD's to cover basins within Indian reservations. For this reason, the bill would compound the problem of improper bifurcation of the Montana adjudication.

Our concern with the piecemealing of Montana's adjudication is based on more than technical considerations emanating from the McCarran Amendment. There is a real chance of unfairness to the United States and Indian Tribes if the adjudication proceeds along two paths. Water claimants whose rights are embodied in TPD's will come to regard those rights as fixed. This is especially troublesome because in our experience many of the rights included in TPD's are greatly exaggerated or

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otherwise inaccurate. In the meantime, the determination of federal and Indian reserved rights is making little or no progress. By the time the Water Court turns to adjudicating the reserved rights (assuming they have not been compacted), the United States and the Tribes will be faced with a wall of opposition from claimants whose claims were included in TPD's, and who may have been relying on the TPD's for years. This result can and should be avoided by avoiding a piecemeal determination of water rights.

B. Federal Law Prohibits Requiring the United States to Pay for Costs. -- Finally, the proposed § 85-2-232(3), insofar as it is applied to the United States, violates federal law. The provision states that any person may obtain a copy of the temporary preliminary or preliminary decree upon payment of a fee.

The McCarran statute directs that "no judgment for costs shall be entered against the United States" in any suit under the Act. 43 U.S.C. § 666(a). For this reason, the federal government may not be required to pay a fee to obtain a copy of a decree in proceedings under the McCarran Amendment.

The required fee constitutes a cost under § 666(a). Although the statute does not define the term "costs," 28 U.S.C. § 1920 defines costs taxable in "any Court of the United States," and is thus an indication of the kinds of costs Congress contemplated when it prohibited exaction of costs against the United States in McCarran Amendment proceedings. Section 1920 lists "[f]ees and disbursements for printing and witnesses" (§ 1920(3)), and "[f]ees for exemplification and copies of papers necessarily obtained for use in the case" (§ 1920(4)) as costs. The fee required by the bill is apparently intended to cover the cost of printing the decree,^{2/} and is thus the kind of litigation cost contemplated by 28 U.S.C. § 1920 (3) and (4). Thus, the fee required by the bill is a cost under 43 U.S.C. § 666(a), which may not be charged against the United States.

II. The Right to Object at Both the TPD and Preliminary Decree Stages Should Be Preserved. -- The comments under this head are directed to the draft bill entitled "An Act Stating that the Water Courts Shall By Order Reopen and Review All Temporary Preliminary Decrees, Preliminary Decrees, and Final Decrees," etc. This bill would permit the reopening of previously entered decrees and allow persons to object to water rights included in those decrees. The draft also specifies that no objection seeking to relitigate "any matter previously litigated and resolved as the result of any previous objection

^{2/} This is because the amount of the fee is set at "\$20 or the cost of printing, whichever is greater ***."

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process" is permitted, unless the objection comes from an Indian Tribe or federal agency "that had commenced negotiations" with the Compact Commission at the time when the matter was litigated, "in which case the tribe or agency is entitled to the benefits of the suspension provided under 85-2-217." See proposed § 1(2) and proposed § 85-2-233(1).

We object to the above-described language in the draft to the extent that it limits the right of any party, including the United States, to object to the same water right claim at both the temporary preliminary and preliminary decree stages. Under the Montana Water Use Act in its current form, there is a right to object at the preliminary decree stage. M.C.A. § 85-2-233. The statute does not restrict the right to object to the preliminary decree as a result of a previous objection to a TPD.

It would be unfair to the United States and other parties to the adjudication to limit the right to object to the preliminary decree. Persons may have failed to object at the TPD stage, justifiably relying on their statutory right to challenge claims at the preliminary decree level. As we read it, the draft bill could retroactively block such persons from objecting to claims in the preliminary decree, contrary to their reasonable expectations. See § 4 of proposed bill, providing for retroactive application.

The draft bill does have the salutary effect of subjecting previously entered TPD's and preliminary decrees to renewed scrutiny before they are transformed into final decrees. However, we submit that this is not an effective means of remedying the problem of inaccurate decrees.

In December of 1987, the United States filed a motion in the Water Court to address the problem of inflated and inaccurate claims embodied in temporary preliminary and preliminary decrees. (See attached copy of motion and supporting brief.) Our motion requested (1) an order directing DNRC to issue reports regarding the need for reexamination of claims (using the improved Claims Examination Rules) in those basins under TPD's or preliminary decrees, and (2) reexamination of claims in five specific basins not yet under decree. By order filed on May 10, 1988, the Water Court denied the second request and took under advisement the first.

We maintain that the surest manner in which to address the problem of inaccurate decrees is to grant the relief requested in our motion. To reopen old decrees for new objections puts the burden on the United States and other parties to investigate their neighbors' water claims, a role which, in general, the parties are not capable of performing adequately. As we noted in support of our motion, that critical role belongs primarily to DNRC. Only with thorough DNRC claims examination,

Ex. #8

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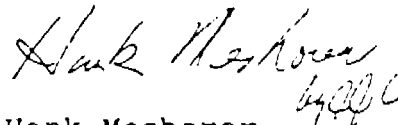
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conducted under the new Claims Examination Rules, can the process result in reasonably fair and accurate decrees of existing rights.

III. Other Comments. The draft bills at several points refer to "federal agencies" as the entities which hold water rights and object to the claims of other parties. (See, e.g., draft bill on reopening decrees, § 1(2).) The language should be changed to reflect that the United States holds water rights and makes objections on behalf of federal agencies and Indian Tribes.

In conclusion, we appreciate this opportunity to comment on the proposed legislation. We are confident that we share the same final goal - a full and fair adjudication of all waters within Montana.

Sincerely,



Hank Meshorer
Chief, Indian Resources Section
Land and Natural Resources
Division

Attachment

cc: Chief Judge Lessley (w/o attachment)

